Assignability of Legal Malpractice Claims

This Note analyzes whether a legal malpractice claim can be assigned to a party outside the attorney-client relationship, an issue not yet addressed by the Alaska courts. The Note discusses the trends in assignability of causes of action in general and in privity and suggests that, increasingly, cases are being litigated by parties outside the relationship giving rise to the suit. The Note then looks to other jurisdictions and finds that most states do not allow such as assignment based on the public policy grounds of the personal nature of the relationship between attorneys and clients and the desire to avoid trafficking in legal malpractice claims. The Note concludes that a case-by-case analysis will be necessary to determine if a specific legal malpractice claim can be assigned in Alaska.

I. INTRODUCTION

May a legal malpractice claim be assigned to a party outside the attorney-client relationship? The Alaska Supreme Court declined to answer this question in the case of *Juneau Factors, Inc. v. Hughes, Thorsness, Gantz, Powell & Brundin.*[1] Therefore, practitioners will have to look to the law of other jurisdictions and to the proceedings in *Juneau Factors* for guidance.

The proceedings that led to the assignment in *Juneau Factors* began with a suit brought by Spaulding Beach Condominium Association ("the Association") against Spaulding Beach Joint Ventures ("Joint Ventures") alleging defects in condominiums constructed by Joint Ventures.[2] The law firm of Hughes Thorsness Gantz Powell & Brundin ("Hughes Thorsness")[3] represented the

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1. No. 1JU-92-1799 CI (Alaska Super. Ct., 1st Judicial Dist. filed Sept. 30, 1992).

2. *See* Amended Complaint at 3, Spaulding Beach Ass'n v. Van Dort, No. 1JU-87-678 CI (Alaska Super. Ct., 1st Judicial Dist. filed Dec. 22, 1989).

3. Renamed "Hughes, Thorsness, Powell, Huddleston & Bauman, L.L.C." in 1996. *Heard on the Street*, ANCHORAGE DAILY NEWS, Sept. 5, 1996, at D1.

Association in the suit.[4] As part of a settlement agreement, the Association assigned any legal malpractice claim it may have had against Hughes Thorsness to the defendant, Joint Ventures.[5] Joint Ventures, who now owned any malpractice claim against Hughes Thorsness, assigned its potential cause of action to Juneau Factors, Inc. ("Juneau Factors"),[6] a corporation whose activities include purchasing and collecting upon causes of action or "factoring" causes of action.[7] Juneau Factors appears to have been created solely for the purpose of accepting the assignment of any cause of action against Hughes Thorsness arising out of the Association/Joint Ventures suit by the same two individuals who owned the defendant corporation, Joint Ventures.[8]

Juneau Factors, assignee, then brought a malpractice action against Hughes Thorsness and one of its attorneys, John Frank, for legal malpractice based on a theory of "lost settlement opportunity."[9] Juneau Factors's complaint stated that in the defective construction suit brought by the Association, the defendant Joint Ventures offered to settle all claims for $415,000.[10] Before this offer was accepted, the trial court granted Joint Ventures's motion for summary judgment, thereby dismissing certain claims.[11] Subsequently, Joint Ventures withdrew its offer of $415,000 and later agreed to pay the Association only $190,000, saving Joint Ventures about $225,000.[12]

Juneau Factors, suing under an assignment from the defendant who just saved $225,000 on the price of settlement, claimed that the defendant should not have just saved $225,000 on the price of settlement. Juneau Factors claimed that the Association's attorney, John Frank, had agreed to ask the trial court to defer ruling on the summary judgment motion while settlement negotiations were taking place but had actually failed to ask for such a deferral.[13] Juneau Factors claimed that this failure resulted in the court

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4. *See* Amended Complaint at 6, *Spaulding Beach Ass'n* (No. 1JU-87-678 CI).

5. *See* Memorandum in Support of Motion for Summary Judgment Re: Invalidity of Assignment of Legal Malpractice Claim, Ex. D, *Juneau Factors* (No. 1JU-92-1799 CI) (containing settlement agreement in *Spaulding Beach Ass'n* (No. 1JU-87-678 CI)).

6. *See id.*, Ex. F at 1.

7. *See id.*

8. *See id.*, Ex. G at 5.

9. Complaint at 4, *Juneau Factors* (No. 1JU-92-1799 CI).

10. *See id.* at 3.

11. The court dismissed the Association's claims for damages arising from a fire. *See id.*

12. *See id.* at 4.

13. *See* Complaint at 3, *Juneau Factors* (No. 1JU-92-1799 CI).

ruling against the Association before the Association had an opportunity to accept the $415,000 offer, thus forcing it to settle for only $190,000.[14]

In the legal malpractice action, Hughes Thorsness moved for summary judgment on the ground that public policy prohibits the assignment of legal malpractice claims.[15] The superior court denied the motion, and the Alaska Supreme Court denied Hughes Thorsness's petition for review.[16] Hughes Thorsness then moved for the superior court to reconsider its ruling on the summary judgment motion.[17] However, the case was settled before the court had an opportunity to rule on the motion for reconsideration.

The Association's legal malpractice claim was worth approximately $225,000 in lost settlement opportunity. Had the Association filed the claim itself, few would have objected, since it was merely trying to recover its own loss. However, when it assigned its claim to Joint Ventures – who suffered no loss from the alleged malpractice, but in fact saved $225,000 on the price of settlement[18] – the assignment is a bit more controversial. Some jurisdictions would object on public policy grounds. Others might view the assignment as a useful settlement tool. This Note examines the controversy and details the approaches courts have employed in determining whether legal malpractice claims are assignable.

Part II of this Note presents the common law approach to issues of assignability of causes of action, concluding that in the malpractice context, assignability is typically decided on public policy grounds. Part III explains the public policy arguments advanced by jurisdictions other than Alaska, and recommends that the Alaska Supreme Court, when faced with the issue, should not adopt the majority's position as a per se rule against assignability. Rather, the Alaska Supreme Court should recognize public policy concerns on both sides of the issue and determine on a case-by-case basis whether the public policy concerns against assignment are present. Part IV applies Alaska law to the *Juneau Factors* case and suggests that the public policy concerns counseling against assignment predominate and thus make the assignments void.

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14. *See id.* at 3-4.

15. *See* Memorandum in Support of Motion for Summary Judgment Re: Invalidity of Assignment of Legal Malpractice Claim at 1, *Juneau Factors* (No. 1JU-92-1799 CI).

16. *See* Memorandum of Law in Support of Motion for Reconsideration at 1-2, *Juneau Factors* (No. 1JU-92-1799 CI).

17. *See id.* at 5.

18. Joint Ventures's subsequent assignment of the claim to Juneau Factors did little to alleviate the apparent inequity, as the shareholders of Juneau Factors are the same two people who own Joint Ventures.

II. THE LAW OF ASSIGNMENT

An assignment is "[t]he act of transferring to another all or part of one's property, interest, or rights."[19] While the early common law rejected all assignments of a cause of action,[20] modern courts allow the assignment of causes of action that survive the death of a party.[21] Even if a cause of action survives, however, a court may reject an assignment on public policy grounds.[22] This public policy restriction on assignability has been the primary source of debate over the assignability of legal malpractice claims.[23]

A. The Common Law of Assignment

Under early common law, a cause of action could not be assigned; "no one could purchase another's right to a suit, either in whole or in part."[24] Two reasons for this rule were generally given. Some courts forbade assignment of a cause of action because "the assignee was not in privity with the person against whom the obligation existed."[25] Other courts based their decisions disallowing assignments on the public policy concern that courts should not be used to enforce any action that hinted at champerty and maintenance.[26]

Today, the original rule of nonassignability has been almost fully abandoned, both by judicial decision and by statute. The assignability of causes of action is now the rule, and nonassignability the exception.[27] The general test of assignability is whether or not the cause of action will survive; if the cause of action survives, it is assignable.[28] Survivability, in turn, often hinges on the nature of the claim, with contractual claims usually surviving and claims in

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19. BLACK'S LAW DICTIONARY 119 (6th ed. 1990).

20. *See* 6 AM. JUR. 2D *Assignments* § 27 (1963).

21. *See id.* §§ 29-30.

22. *See id.* § 30.

23. *See infra* Part III.

24. 6 AM. JUR. 2D *Assignments* § 27 (1963).

25. *Id.* "In its broadest sense, 'privity' is defined . . . as such an identification of interest of one person with another as to represent the same legal right." BLACK'S LAW DICTIONARY 1199 (6th ed. 1990). The decline of the privity rule has made this rationale obsolete. *See* Biakanja v. Irving, 320 P.2d 16, 18 (Cal. 1958).

26. *See* 6 AM. JUR. 2D *Assignments* § 27 (1963). Champerty is a "bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds; it is one type of 'maintenance,' the more general term which refers to maintaining, supporting, or promoting another person's litigation." BLACK'S LAW DICTIONARY 231 (6th ed. 1990).

27. *See* 6 AM. JUR. 2D *Assignments* § 29.

28. *See id.* § 30.

the nature of a personal tort not surviving. As a result, "[p]ractically the only [causes of] action which are not assignable are those for torts for personal injuries and for wrongs done to the person, the reputation, or the feelings of the injured party, and those for breach of contracts of a purely personal nature, such as promises of marriage."[29] Survivability is not the only factor, however.[30] As noted above, if the assignment of a survivable cause of action is contrary to public policy, it will not be enforced.[31]

B. Alaska's Law of Assignment

Alaska's law of assignment closely resembles the evolution of the common law in this area. An early decision based assignment on the survivability of, and nature of, the claim to be assigned.[32] In *Ishmael v. City Electric*,[33] the court first acknowledged that early doctrine dictated that a cause of action arising in tort was not assignable in law or equity on the grounds that tort causes of action did not survive.[34] Next, the court explained how early English statutes modified the rule of nonassignability of tort actions to allow the survival of those tort actions involving damage to real or personal property, but not causes of action for personal injuries.[35] The court concluded that this evolution served to remove restrictions on assignability of tort causes of action for damage to real or personal property, but since no statute provided for the survivability for tort causes of action for personal injury, such causes of action were still not assignable.[36]

Alaska statutes now provide that all causes of action except defamation survive.[37] Following the reasoning in *Ishmael*, one might expect that all causes of action except defamation are now assignable, and that the inquiry ends here. Such is not the case, however. Recall that the common law provides that if the assignment of a survivable cause of action is contrary to public policy, it will not be enforced.[38] This public policy exception is alive and well in Alaska, as evidenced by the case of *Croxton v. Crowley*

29. *Id.* § 29.
30. *See id.* § 30.
31. *See id.; see also infra* Part III.
32. *See* Ishmael v. City Electric, 91 F. Supp. 688, 689-90 (D. Alaska 1950) (applying Alaska law).
33. 91 F. Supp. at 689-90.
34. *See id.* at 689.
35. *See id.*
36. *See id.*
37. *See* ALASKA STAT. § 09.55.570 (Michie 1996).
38. *See supra* notes 26 & 31 and accompanying text.

Maritime Corp.[39]

Croxton involved the reassignment of a cause of action for wrongful death from an employer to the deceased employee's estate.[40] Ruth Croxton was killed in an airplane crash while working for Puget Sound Tug and Barge Co. ("PST & B"), a wholly owned subsidiary of Crowley Maritime Corporation ("Crowley").[41] Because Croxton died without dependents, her employer, PST & B, was required to deposit $10,000 into a second injury fund.[42] This payment operated as an assignment to PST & B of any wrongful death action her estate may have had against third parties such as Crowley.[43] Croxton's estate attempted to bring a wrongful death suit against Crowley after PST & B assigned back to the estate its right to bring the wrongful death suit.[44] The trial court found the reassignment invalid and dismissed the suit.[45]

The Alaska Supreme Court reversed on the ground that the reassignment was permissible because it did not violate public policy.[46] The court began its analysis by noting that *Ishmael* held that tort actions for personal injuries are not assignable because they do not survive.[47] Noting that all causes of action other than defamation now survive in Alaska, the court focused its discussion on other jurisdictions that based their assignability decisions on public policy, thus suggesting that it did not consider survivability a determinative test for assignability.[48]

Turning to the public policy concerns, the court explained that some courts did not allow causes of action for personal injuries to be assigned because they "'felt that unscrupulous people would purchase causes of action and thereby traffic in lawsuits for pain and suffering.'"[49] The court found that while "this reason may be sensible in other situations," it didn't make much sense in the case at bar where the suit was reassigned back to the estate of the deceased employee who would have had the right to bring it in the first place but for the assignment by operation of law under the

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39. 758 P.2d 97, 98 (Alaska 1988).

40. *See id.* at 98.

41. *See id.* at 97.

42. *See id.* (citing ALASKA STAT. § 23.30.040(c) (Michie 1996)).

43. *See id.* (citing ALASKA STAT. § 23.30.015(c)).

44. *See id.* at 98. Had Alaska Statutes § 23.30.015(c) not been in operation, any wrongful death suit would have belonged to the estate, and no assignment back to the estate would have been necessary.

45. *See id.*

46. *See id.* at 99.

47. *See id.* at 98, 99 n.2.

48. *See id.* at 99 & n.2.

49. *Id.* at 99 (quoting Harleysville Mut. Ins. Co. v. Lea, 410 P.2d 495, 498 (Ariz. App. 1966) (cite omitted)).

workers' compensation regime.[50] The court found the reassignment to be "considerably less offensive to us than when an unrelated third party purchases the rights to such a cause of action."[51] The court concluded that the main purposes for the general rule of non-assignability of claims for personal injury, "'to prevent unscrupulous strangers to an occurrence from preying on the deprived circumstances of an injured person, and to prohibit champerty, simply have no applicability where the assignment is to the injured person himself.'"[52]

C. The Law of Assignment Applied to Legal Malpractice

Many courts, when considering whether a cause of action for legal malpractice should be assignable, struggle with the vestiges of survivability rules and their rationale when trying to resolve the issue. Recall that survivability often hinges on the nature of the claim, with contractual claims usually surviving and claims in the nature of a personal tort not surviving.[53] Some courts find that legal malpractice is more like a personal tort and deny assignability. Other courts find that legal malpractice is more like a contractual claim and allow assignability.

Many courts, however, recognize that legal malpractice actions involve both tort and contract principles, and therefore to base an assignability decision on the nature of the claim would not make much sense. Like any negligence-based tort, to recover for legal malpractice a plaintiff must prove duty, breach, proximate cause and damages.[54] Yet the attorney's duty is often based on the contractual relationship between attorney and client.[55] Courts, recognizing this conflict between tort and contract, are required to turn to public policy to determine whether causes of action for legal malpractice should be assigned.

The way Alaska courts perceive the nature of the claim is not likely to help determine the question of assignability, either. The Alaska Supreme Court has categorized legal malpractice as a subset of professional malpractice, which in turn has been classified as a hybrid of tort and contract law.[56] In addition, the supreme court

50. *Id.*

51. *Id.*

52. *Id.* (quoting Caldwell v. Ogden Sea Trans., 618 F.2d 1037, 1048 (4th Cir. 1980) (footnote omitted)).

53. *See supra* Part II.A.

54. *See, e.g.*, Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83, 85 (Cal. Ct. App. 1976); Fiddler v. Hobbs, 475 N.E.2d 1172, 1173 (Ind. Ct. App. 1985).

55. *See, e.g.*, McGlone v. Lacey, 288 F. Supp. 662, 665-66 (D.S.D. 1968); Bloomer Amusement Co. v. Eskenazi, 394 N.E.2d 16, 18 (Ill. App. Ct. 1979).

56. *See* Breck v. Moore, 910 P.2d 599, 603 (Alaska 1996).

has charged courts "'[to] avoid applications of the law which lead to different substantive results based upon distinctions having their source solely in the niceties of pleading and not in the underlying realities.'"[57] Exercising that charge, the Alaska Supreme Court has itself applied statutes of limitations based on contract law,[58] and theories of negligence based on tort law, to professional malpractice cases.[59] Therefore, it is unlikely that the Alaska Supreme Court will rely on the difficult contract/tort distinction to determine assignability. The court will thus need to consider questions of public policy.

The public policy concerns at issue in the assignment of a legal malpractice claim are outlined in the following section. A majority of courts that have dealt with this issue have accepted the public policy arguments against assignment.[60] A minority of courts have rejected these arguments in favor of the public policy concerns that counsel in favor of assignment.[61] The Alaska Supreme Court's careful evaluation of public policy in *Croxton* suggests that the court will honor Alaska's preference for the assignability of claims and invoke the policies against assignment only in cases where they truly apply.

III. PUBLIC POLICY

Common law provided that if the assignment of a survivable cause of action is contrary to public policy, it will not be enforced.[62] The public policy arguments have proven dispositive in a number of jurisdictions.

A. Jurisdictions other than Alaska

Jurisdictions disagree about whether legal malpractice claims should be assignable. The majority of states that have dealt with the issue have ruled that such assignments should not be allowed.

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57. Jones v. Wadsworth, 791 P.2d 1013, 1017 (Alaska 1990) (quoting Higa v. Mirikitani, 517 P.2d 1, 4 (Hawaii 1973)).

58. *See* Lee Houston & Assocs. v. Racine, 806 P.2d 848, 855 (Alaska 1991) (professional malpractice involving economic loss); *Wadsworth*, 791 P.2d at 1015 (legal malpractice due to breach of an express promise). For an argument that the nature of a professional malpractice claim is more like a tort than a contract action, see Scott Lawrence Altes, Note, *The Statute of Limitations for Professional Malpractice in Alaska After* Lee Houston & Associates, Ltd. v. Racine, 9 ALASKA L. REV. 41 (1992).

59. *See* Belland v. O.K. Lumber Co., 797 P.2d 638, 640 (Alaska 1990) (citing Linck v. Barokas & Martin, 667 P.2d 171, 173 n.4 (Alaska 1983)).

60. *See infra* Part III.A.1.

61. *See infra* Part III.A.2.

62. *See* 6 AM. JUR. 2D *Assignments* § 30 (1963).

A handful of states, however, have upheld assignability.

1. *Arguments Against Assignment.* The jurisdictions that have barred assignment of legal malpractice claims are Arizona,[63] California,[64] Colorado,[65] Connecticut,[66] Florida,[67] Illinois,[68] Indiana,[69] Kansas,[70] Kentucky,[71] Michigan,[72] Minnesota,[73] Missouri,[74] Nebraska,[75] Nevada,[76] New Jersey,[77] Tennessee[78] and Texas.[79] Public policy concerns are key factors for these jurisdictions. The leading case, from a California court of appeals, is *Goodley v. Wank & Wank, Inc.*[80] In *Goodley*, the law firm of Wank & Wank negligently advised its client, Eleanor Katz, during her divorce proceeding.[81] The firm told Mrs. Katz that she need not safeguard her husband's life insurance policies by bringing them into the firm

63. *See* Schroeder v. Hudgins, 690 P.2d 114, 118-19 (Ariz. Ct. App. 1984).

64. *See* Kracht v. Perrin, Gartland & Doyle, 268 Cal. Rptr. 637, 639-41 (Cal. Ct. App. 1990); Jackson v. Rogers & Wells, 258 Cal. Rptr. 454 (Cal. Ct. App. 1989); Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83 (Cal. Ct. App. 1976).

65. *See* Roberts v. Holland & Hart, 857 P.2d 492, 495 (Colo. Ct. App. 1993).

66. *See* Continental Cas. Co. v. Pullman, Comley, Bradley & Reeves, 709 F. Supp. 44, 50 n.7 (D. Conn. 1989) (expressing the court's belief that the Connecticut Supreme Court would bar assignment of legal malpractice claims).

67. *See* Washington v. Fireman's Fund Ins. Co., 459 So. 2d 1148 (Fla. Dist. Ct. App. 1984).

68. *See* Christison v. Jones, 405 N.E.2d 8 (Ill. App. Ct. 1980).

69. *See* Picadilly, Inc. v. Raikos, 582 N.E.2d 338 (Ind. 1991).

70. *See* Bank IV Wichita, Nat'l Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson, 827 P.2d 758, 765 (Kan. 1992).

71. *See* Coffey v. Jefferson County Bd. of Educ., 756 S.W.2d 155 (Ky. Ct. App. 1988).

72. *See* Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 303 n.15 (Mich. 1991) (stating that Michigan Court of Appeals had found legal malpractice claims non-assignable); Joos v. Drillock, 338 N.W.2d 736, 738-39 (Mich. Ct. App. 1983).

73. *See* Wagener v. McDonald, 509 N.W.2d 188, 191 (Minn. Ct. App. 1993).

74. *See* Scarlett v. Barnes, 121 B.R. 578, 583 (W.D. Mo. 1990) (applying Missouri law).

75. *See* Earth Science Lab., Inc. v. Adkins & Wondra, P.C., 523 N.W.2d 254, 256-57 (Neb. 1994).

76. *See* Chaffee v. Smith, 645 P.2d 966 (Nev. 1982).

77. *See* Alcman Servs. Corp. v. Samuel H. Bullock, P.C., 925 F. Supp. 252, 258 (D.N.J. 1996) (anticipating New Jersey law).

78. *See* Can Do, Inc. Pension and Profit Sharing Plan and Successor Plans v. Manier, Herod, Hollabaugh & Smith, 922 S.W.2d 865, 869 (Tenn. 1996).

79. *See* Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 318 (Tex. App. 1994).

80. 133 Cal. Rptr. 83 (Cal. Ct. App. 1976).

81. *See id.* at 83.

or by obtaining a court order to protect them from change.[82] Subsequently, Mrs. Katz's husband found the policies and canceled them.[83] After her husband died, Mrs. Katz assigned her malpractice claim against Wank & Wank to Goodley.[84] The California Court of Appeals affirmed the trial court's order granting the defendant attorney's summary judgment motion on the ground that legal malpractice actions may not be assigned for public policy reasons.[85] The court's reasoning is contained in the following oft-quoted passage:

> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing [sic] such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.[86]

The following discussion shows how other courts have adopted the reasoning in *Goodley* and applied it to varying factual situations.

a. *The Personal Nature of Legal Services and the Attorney-Client Relationship.* The Illinois Court of Appeals, in *Christison v. Jones,*[87] focused on the nature of the attorney-client relationship in denying the assignability of legal malpractice claims. Christison, a trustee in bankruptcy, claimed ownership of any cause of action

82. *See id.*
83. *See id.*
84. *See id.*
85. *See id.* at 83, 88.
86. *Id.* at 87.
87. 405 N.E.2d 8 (Ill. App. Ct. 1980).

the bankrupt might have against his attorney, Jones.[88] Jones had allegedly been negligent in his representation of the bankrupt prior to the bankruptcy proceedings.[89] The court ruled that the legal malpractice claim was not assignable to Christison based on the personal nature of the relationship between attorney and client.[90] The court explained that the relationship between an attorney and his client is fiduciary, and that the attorney owes his client the "utmost degree of fidelity, honesty and good faith."[91] This highly personal relationship is one that should be jealously honored and guarded by the attorney.[92] One way that this relationship is guarded is by requiring the client's consent before delegating the performance of legal services to another attorney.[93] Quoting the public policy rationale in *Goodley*, the court concluded that it would be inappropriate for the client to assign the cause of action against the attorney to another party.[94]

In holding that the attorney-client relationship is of a personal nature, courts have refused to look at the particular relationship in the proceeding at bar. In *Moorhouse v. Ambassador Insurance Co.*,[95] the Michigan Court of Appeals stated that such an examination would be unacceptable and lead to "the impossible task of dissecting the closeness of an attorney-client relationship in evaluating the validity of every assignment of a cause of action for legal malpractice."[96]

b. *Preservation of the Attorney-Client Privilege. Kracht v. Perrin Gartland & Doyle*[97] stands for the proposition that when a legal malpractice claim is involuntarily assigned to a third party, the attorney-client privilege is not waived unless by express consent of the assignor.[98] In that case, Kracht had filed suit against Hogue, who was represented by attorneys Perrin, Gartland and Doyle.[99] Hogue failed to respond adequately to some discovery requests made by Kracht, resulting in summary judgment against

88. *See id.* at 8.
89. *See id.*
90. *See id.* at 10-12.
91. *Id.* at 10.
92. *See id.* at 10-11.
93. *See id.* at 11 (citing Cornelius v. Wash., 1 Ill. 98, 100 (1825)); *see also* Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83, 86 (Cal. Ct. App. 1976).
94. *See Christison*, 405 N.E.2d at 11-12.
95. 383 N.W.2d 219 (Mich. Ct. App. 1985).
96. *Id.* at 221.
97. 268 Cal. Rptr. 637 (Cal. Ct. App. 1990).
98. *See id.*
99. *See id.* at 638.

Hogue.[100] Kracht contended that but for the negligence of Hogue's attorneys, summary judgment would not have been entered in her favor.[101] She obtained a court order compelling Hogue to assign the causes of action Hogue held against his attorneys to her.[102] Because the client, Hogue, had not brought the suit, the attorney-client privilege was not waived, and the attorneys' defense would be bound by their confidential relationship with Hogue.[103] The court ruled against the assignment of the claim, stating that such an involuntary assignment would unfairly prejudice the attorneys if they were not allowed to use privileged information in their defense or would unfairly prejudice the client if he were forced to waive the privilege.[104]

c. *Potential for Commercialization and an Increase in the Number of Claims.* The court in *Goodley v. Wank & Wank*[105] held that the assignment of legal malpractice claims was contrary to public policy because it would relegate such an action to the marketplace and convert it into a commodity to be exploited by profit-seeking bidders who had never established a professional relationship with the attorney.[106] Numerous courts have agreed with this rationale.[107] The *Goodley* court also reasoned that the commercialization of legal malpractice claims could only debase the legal profession by encouraging unjustified suits, promoting champerty and increasing the frequency of malpractice litigation.[108] This rationale was also used in the Illinois case *Christison v. Jones*,[109] discussed above,[110] which involved a trustee in bankruptcy who claimed that he was the owner of any malpractice action which the bankrupt might hold.[111] The court, in rejecting the assignment, noted that the bankrupt found no fault with his

100. *See id.*
101. *See id.*
102. *See id.*
103. *See id.* at 641 n.6.
104. *See id.*
105. 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976).
106. *See id.* at 87.
107. *See, e.g.*, Continental Cas. Co. v. Pullman, Comley, Bradley & Reeves, 709 F. Supp. 44, 50 n.7 (D. Conn. 1989); Jackson v. Rogers & Wells, 258 Cal. Rptr. 454, 461 (Cal. Ct. App. 1989); Brocato v. Prairie State Farmers Ins. Ass'n, 520 N.E.2d 1200, 1201-02 (Ill. App. Ct. 1988); Clement v. Prestwich, 448 N.E.2d 1039, 1041-42 (Ill. App. Ct. 1983); Joos v. Drillock, 338 N.W.2d 736, 738-39 (Mich. Ct. App. 1983).
108. 133 Cal. Rptr. at 87.
109. 405 N.E.2d 8 (Ill. App. Ct. 1980).
110. *See supra* notes 87-94 and accompanying text.
111. *See Christison,* 405 N.E.2d at 8.

attorney's work and did not desire to bring suit.[112] Thus, allowing an assignment would have created litigation initiated by parties other than those directly affected.

d. *Risk of Collusion.* In *Coffey v. Jefferson County Board of Education*,[113] the court expressed concern that a client and potential assignee might enter into a collusive agreement whereby the client would admit liability or agree to settle in exchange for the assignment of a malpractice action to satisfy the judgment.[114] In *Coffey*, a defendant in a negligence suit confessed a judgment of $1 million and tried to assign all malpractice claims against his attorneys to the plaintiff on the day of the trial.[115] The court refused to allow this assignment, holding that the arrangement seemed to be so collusive that it violated public policy.[116]

As noted by the Indiana Supreme Court in *Picadilly, Inc. v. Raikos*,[117] the risk of collusion may be particularly great when the client is judgment-proof. According to the court, the defendant's attorneys would be the only possible source of recovery for the plaintiff; "[i]f assignments were permitted, we suspect that they would become an important bargaining chip in the negotiation of settlements – particularly for clients without a deep pocket."[118]

e. *Restriction of the Availability of Legal Services.* The threat of assignment may also cause lawyers to decline to represent judgment-proof defendants because often the only way the plaintiff could recover would be to bring suit, as the defendant's assignee, against the defendant's lawyer for malpractice. The case of *Zuniga v. Groce, Locke & Hebdon*[119] provides an example of an assignment that was used as "a transparent device to replace a judgment-proof, uninsured defendant with a solvent defendant,"[120] namely the attorney. In *Zuniga*, the plaintiffs brought a personal injury action against Bauer Manufacturing Company ("Bauer").[121] Bauer's insurer had become insolvent and Bauer feared that a large judgment against it would bankrupt the company.[122] Zunigas' lawyers offered to settle with Bauer for a $25 million judgment and

112. *See id.* at 11.
113. 756 S.W.2d 155 (Ky. Ct. App. 1988).
114. *See id.* at 156-57.
115. *See id.* at 156.
116. *See id.* at 157.
117. 582 N.E.2d 338 (Ind. 1991).
118. *Id.* at 343.
119. 878 S.W.2d 313, 317 (Tex. App. 1994).
120. *Id.*
121. *See id.* at 314.
122. *See id.*

an assignment of Bauer's malpractice action against its attorneys.[123] The Zunigas never intended to collect the judgment from Bauer; instead they agreed that Bauer could transfer all its assets but the malpractice claim to a new company, against which the Zunigas would not assert a claim.[124] Thus the entire liability would be borne by the attorneys defending the malpractice action.[125]

The *Zuniga* court rejected the assignment of the malpractice claim as a "transparent device" to substitute the defendant's attorneys for the defendant company, which might not have been able to absorb the liability.[126] The court concluded that, "in time, it would become increasingly risky to represent the underinsured, judgment-proof defendant," and that any goals served by assignment would not justify the detrimental impact such an assignment would have on the legal system.[127]

An assignment may also restrict the availability of legal services by increasing the cost to the potential assignee of a legal malpractice claim. For example, in the *Juneau Factors* case, once the settlement offer was made and the assignment of the malpractice claim against Hughes Thorsness was proposed, Hughes Thorsness had the duty to advise its client to seek outside counsel to evaluate the attractiveness of any settlement that included an assignment of rights against themselves.[128] Review of the settlement by another attorney not only delays the settlement negotiation, but also imposes an extra cost on the parties attempting to settle the case. The cost of hiring an attorney to become familiar with both the primary case and the potential malpractice action would likely be substantial. If the assignment of legal malpractice claims as a part of settlement becomes accepted and routine, the additional cost necessary to deal with potential assignments may restrict the number of clients able to use the court system for the resolution of their disputes.

f. *Potential for Illogical Arguments Asserted by Assignee.* The court in *Jackson v. Rogers & Wells*[129] explained that a malpractice suit brought against an attorney by a former adversary is "fraught with illogic."[130] In the initial lawsuit, the adversary

123. *See id.*
124. *See id.*
125. *See id.*
126. *Id.* at 317.
127. *Id.*
128. *See* Letter from Thomas G. Nave, attorney, Juneau, Alaska, to Jennifer McDannell, Editor-in-Chief, *Alaska Law Review* (Jan. 4, 1996) (on file with author).
129. 258 Cal. Rptr. 454 (Cal. Ct. App. 1989).
130. *Id.* at 461.

argued that she was entitled to recover from the client; in the malpractice lawsuit, she must argue that, but for the attorney's negligence, she was not entitled to recover.[131] Such an argument, while logically consistent, may run afoul of jurors' common sense and cause them to lose faith in the court system.

The underlying suit in *Jackson* was brought by Jackson against attorney Ronald Mix and others for legal malpractice and securities fraud.[132] Mix's malpractice carriers retained Rogers & Wells to defend Mix.[133] On the advice of Rogers & Wells, Mix rejected several settlement offers by the plaintiff Jackson ranging from $415,000 to $700,000 and proceeded to trial where the plaintiff recovered more that $1 million.[134] Jackson filed a bad faith cause of action against Rogers & Wells and Mix's insurance carriers.[135] The assignment at issue occurred when Jackson settled with the insurance carriers and the insurance carriers assigned to Jackson any malpractice claim they might have against Rogers & Wells, the attorneys they hired to represent Mix.[136] The court, in rejecting the assignment, explained how Jackson's position in the suit against Rogers & Wells would be illogical:

> By claiming as an assignee of the carriers that the attorney defendants should have settled his action against Mix earlier, he in effect claims that his own recovery by means of judgment after court trial should have been diminished in the amount by which it exceeds those settlement offers which allegedly should have been accepted.[137]

The court refused to let Jackson recover damages, plus his own judgment, for the alleged malpractice that allowed him to win that judgment.[138]

g. *Deterrence of Zealous Advocacy and the Duty of Loyalty.* Some courts reason that the attorney's duties of loyalty and zealous advocacy may be compromised by the threat of assignment. For example, in *Picadilly, Inc. v. Raikos*,[139] Charles Colvin recovered $225,000 when he was injured in an automobile accident caused by a drunken patron of Picadilly's bar.[140] Picadilly filed for bankruptcy, and the assignment of Picadilly's malpractice

131. *See id.*
132. *See id.* at 455.
133. *See id.*
134. *See id.*
135. *See id.*
136. *See id.*
137. *Id.* at 461-62.
138. *See id.* at 462.
139. 582 N.E.2d 338, 342 (Ind. 1991).
140. *See id.* at 339.

action against its attorneys to Colvin was part of the reorganization plan.[141] The Indiana Supreme Court held the assignment invalid on public policy grounds, citing among them the risk that the attorney's duty of loyalty and zealous advocacy would be impaired.[142] The court stated:

> The assignment of a legal malpractice claim is perhaps most incompatible with the attorney's duty of loyalty. An attorney's loyalty is likely to be weakened by the knowledge that a client can sell off a malpractice claim, particularly if an adversary can buy it. If an attorney is providing zealous representation to a client, the client's adversary will likely be motivated to strike back at the attorney in any permissible fashion. If an adversary can retaliate by buying up a client's malpractice action, attorneys will begin to rethink the wisdom of zealous advocacy.[143]

The court concluded that assignments should not be allowed because they would discourage loyalty to the client and therefore be a disservice to that client.[144]

2. *Arguments in Favor of Assignment.* The following jurisdictions have allowed assignment of legal malpractice claims: the District of Columbia,[145] Maine,[146] New York,[147] Oregon,[148] Pennsylvania[149] and Utah.[150] Most of these jurisdictions either reject the public policy concerns of the jurisdictions not allowing assignments,[151] or base their holdings on the public policy concerns of efficiency, lack of an attorney-client relationship, and general equity principles.[152]

a. *Efficiency.* At least one court has found that efficiency in prosecuting attorney malpractice is a public policy concern sufficiently important to justify the assignment of such claims. In

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141. *See id.*

142. *See id.* at 342.

143. *See id.*

144. *See id.*

145. *See* Richter v. Analex Corp., 940 F. Supp. 353, 359 (D. D.C. 1996).

146. *See* Thurston v. Continental Cas. Co., 567 A.2d 922, 923 (Me. 1989).

147. *See* Oppel v. Empire Mut. Ins. Co., 517 F. Supp. 1305, 1307 (S.D.N.Y. 1981); American Hemisphere Marine Agencies, Inc. v. Kreis, 244 N.Y.S.2d 602, 603 (N.Y. 1963).

148. *See* Collins v. Fitzwater, 560 P.2d 1074, 1077-78 (Or. 1977).

149. *See* Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 539 A.2d 357, 359 (Pa. 1988); Ammon v. McCloskey, 655 A.2d 549, 551 (Pa. Super. Ct. 1995).

150. *See* Tanasse v. Snow, 929 P.2d 351, 356 (Utah 1996) (involuntary transfer).

151. *See, e.g.*, Richter v. Analex Corp., 940 F.Supp. 353, 357 (D.D.C. 1996).

152. *See, e.g.*, Thurston v. Continental Cas. Co., 567 A.2d 922, 923 (Me. 1989); *Hedlund Mfg. Co.*, 539 A.2d at 359; *Collins*, 560 P.2d at 1078.

Thurston v. Continental Casualty Co.,[153] a products liability action was brought against 3K Kamper Ko.[154] Alleged inadequate legal representation and misconduct by its insurance carrier caused 3K to suffer judgment in excess of its policy limits.[155] Because 3K could not pay the judgment, it assigned its malpractice claim to the victorious products liability plaintiff.[156] The court allowed the assignment, stating that a client should be able to "realiz[e] the value of its malpractice claim in what may be the most efficient way possible, namely, its assignment to someone else with a clear interest in the claim who also has the time, energy and resources to bring the suit."[157]

b. *Lack of Attorney-Client Relationship.* Another court concluded that relying on the attorney-client relationship to prohibit assignment of legal malpractice actions is misplaced. *Hedlund Manufacturing Co. v. Weiser, Stapler & Spivak*[158] involved the assignment of a legal malpractice action for failure to file timely a patent application to a purchaser of the client's business.[159] The court noted the long-standing rule in Pennsylvania that permits causes of action to be assigned,[160] and held that legal malpractice actions do not warrant a public policy exception.[161] The court, apparently responding to arguments by courts in other states that the public policy interest in the sanctity of the attorney-client relationship should bar an assignment, found that the attorney-client relationship should not be used "as a shield by an attorney to protect him or her from the consequences of legal malpractice."[162] The court reasoned that "[w]here the attorney has caused harm to his or her client, there is no relationship that remains to be protected."[163]

c. *General Principles of Equity.* In *Collins v. Fitzwater*,[164] an attorney made an error in drafting promissory notes that were issued by a corporation to various purchasers and that resulted in a judgment being entered against the corporation and its board of

153. 567 A.2d 922 (Me. 1989).
154. *See id.* at 923.
155. *See id.*
156. *See id.*
157. *Id.*
158. 539 A.2d 357 (Pa. 1988).
159. *See id.* at 358.
160. *See id.*
161. *See id.* at 359.
162. *Id.*
163. *Id.*
164. 560 P.2d 1074, 1078 (Or. 1977).

directors.[165] One member of the board of directors assigned his cause of action against the attorney to the note-holders in exchange for covenants not to execute upon the judgment obtained.[166] The court allowed the assignment, noting that laypersons who must act as corporate directors rely on attorneys as a matter of necessity.[167] The court explained that public policy recognizes that the layperson should not have to assume the burden of the attorney's error when it allows a legal malpractice suit to be brought against the attorney.[168] Similarly, the court reasoned, an assignment of the cause of action should also be allowed.[169]

B. Alaska

The Alaska Supreme Court has never directly addressed the issue of whether a legal malpractice claim should be assignable. Thus, an examination of the statements of lower courts and cases in related contexts is necessary to reveal the public policy concerns that might influence the Supreme Court on the issue of assignability.

The closest that any Alaska court has come to discussing the policies involved in an assignment of a legal malpractice claim occurred in the *Juneau Factors* case itself. The superior court judge denied Hughes Thorsness's motion for summary judgment, rejecting the law firm's argument that public policy prohibits the assignment of legal malpractice claims.[170] The judge stated his belief that the Alaska Supreme Court would allow assignment of a legal malpractice claim:

> I believe the Supreme Court has given indications in *Deal v. Kearney* and *Bohna* that the idea of providing resources for prosecution in malpractice claims is something that they believe is worthy and the idea of not creating special classes of protected persons that are lawyers is worthy . . . .[171]

An examination of the cases referred to by the superior court reveals that Alaska courts may be sympathetic toward the public policy concerns expressed by states on both sides of the issue.

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165. *See id.* at 1075-76.

166. *See id.* at 1076.

167. *See id.* at 1078.

168. *See id.*

169. *See id.*

170. *See* Order Denying Motion for Summary Judgment, Juneau Factors, Inc. v. Hughes Thorsness Gantz Powell & Brundlin, No. 1JU-92-1799 CI (Alaska Super. Ct. Nov. 22, 1993).

171. Transcription of Judge's Oral Decision on the Record at 1, *Juneau Factors*, No. 1JU-92-1799 CI (Alaska Super. Ct., 1st Judicial Dist. Nov. 12, 1993).

Whether these policy concerns, or those relied on by the majority of states to disallow assignment, are applicable in the Juneau Factors case will be discussed in Part VI.

1. Deal v. Kearney: *Assignment of Medical Malpractice Claims.* Public policy did not bar the assignment of a professional malpractice claim against a doctor in *Deal v. Kearney*.[172] In *Deal*, Kearney brought suit against the administrator of the hospital where he was treated for a life-threatening injury, claiming negligence on the part of Dr. Deal, one of the treating physicians.[173] Kearney settled with the hospital administrator. Included in the settlement was an assignment of the administrator's claims for indemnity, equitable subrogation and contribution against Dr. Deal.[174] In holding that such an assignment did not violate public policy,[175] the Alaska Supreme Court stated that the assignment was not subject to the general rule of non-assignability of personal injury claims because the assigned claims of indemnity, equitable subrogation and contribution, whether characterized as contract or tort claims, did not constitute "personal injury" to the hospital.[176] The court also found it critical that while Kearney was not directly injured with respect to the assigned claims, he was not a stranger to the litigation.[177]

The principles enunciated in *Deal v. Kearney* may be applied to the legal malpractice context to allow assignment when no personal injury is involved and the assignee is not a stranger to the litigation. It is clear from *Croxton* that there exists in Alaska a public policy against trafficking in lawsuits for pain and suffering.[178] This public policy is not typically implicated in a legal malpractice claim. Like the medical malpractice claim at issue in *Deal*, which did not involve pain and suffering, a legal malpractice claim, whether characterized as a tort or contract claim, usually does not constitute "personal injury" to a client for which the client can seek damages for pain and suffering. While the relationship between attorney and client may be highly personal, typically, the actual injury is pecuniary only.[179] Thus, the valid public policy against unscrupulous strangers taking advantage of victims' pain and suf-

172. 851 P.2d 1353 (Alaska 1993).
173. *See id.* at 1354.
174. *See id.*
175. *See id.* at 1356.
176. *See id.* at 1355-56.
177. *See id.* at 1356.
178. *See* Croxton v. Crowley Maritime Corp., 758 P.2d 97, 99 (Alaska 1988) (quoting Harleysville Mut. Ins. Co. v. Lea, 410 P.2d 495, 498 (Ariz. App. 1966) (citing Rice v. Stone, 83 Mass. 566 (1861))).
179. *See id.*

fering is not applicable and should not bar assignment of a legal malpractice claim, particularly when the assignee is somehow connected to the litigation as in *Deal.* To avoid the distasteful inference of protectionism that would ensue through the creation of a protected class of lawyers, Alaska courts must address each proposed assignment to see whether valid public policy concerns are threatened.

2. Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin: *Voluntary Assignment of the Proceeds of Legal Malpractice Claims.* The Alaska Supreme Court allowed assignment of the proceeds of a legal malpractice claim in the context of a loan receipt agreement ("LRA") in *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin.*[180] The assignment in *Bohna* arose out of a settlement between Allstate Insurance Company and its insured, Bohna. Bohna sued Allstate and Hughes Thorsness for negligence, breach of fiduciary duty and breach of the covenant of good faith and fair dealing as a result of Hughes Thorsness's defense of Bohna in an automobile accident case.[181] Allstate settled with Bohna by paying $1 million and loaning him an additional $3 million to be repaid from any recovery Bohna was able to extract from Hughes Thorsness.[182] Bohna also agreed not to dismiss his suit against Hughes Thorsness without Allstate's consent.[183] The Alaska Supreme Court rejected the contention that the LRA constituted an impermissible assignment of a malpractice claim, stating that, at most, the agreement was a partial assignment of the proceeds of the malpractice claim.[184]

The *Bohna* court also noted that LRAs had long been utilized as a device to allow an insurance company to compensate injured insureds while preserving its rights against potentially liable third parties.[185] The court upheld the use of LRAs as a settlement device and expressly agreed with other jurisdictions that allow such assignments.[186] The *Bohna* decision therefore demonstrates that the Alaska Supreme Court is receptive to arguments that promote the efficient vindication of rights through litigation. However, the court did not extend its reasoning to include the assignment of the

180. 828 P.2d 745 (Alaska 1992).
181. *See id.* at 751.
182. *See id.*
183. *See id.*
184. *See id.* at 757.
185. *See id.* at 755.
186. *See id.* at 758 (citing Weston v. Dowty, 414 N.W.2d 165, 167 (Mich. Ct. App. 1987); First Nat'l Bank of Clovis v. Diane, Inc., 698 P.2d 5, 14 (N.M. Ct. App. 1985)).

causes of action themselves. An argument for just such an extension was made by the plaintiff in *Juneau Factors v. Hughes, Thorsness, Gantz, Powell & Brundin* in its brief in opposition to defendant's motion for summary judgment.[187] The superior court denied summary judgment without an opinion,[188] leaving the status of this argument unresolved.

3. Bergen v. F/V St. Patrick*: Involuntary Assignment of Legal Malpractice Claims.* In a case not mentioned by the superior court in *Juneau Factors*, the U.S. District Court for the District of Alaska found that no public policy concerns barred the involuntary transfer of a legal malpractice claim, again suggesting that the prosecution of legal malpractice claims is an important public policy. In *Bergen v. F/V St. Patrick*, [189] the court concluded that under Alaska law, a judgment debtor's potential cause of action against its law firm was subject to involuntary transfer by way of an execution sale.[190] Unlike other courts, the *Bergen* court did not express concern that involuntary transfers were problematic because they either forced clients to waive their attorney-client privilege or forced attorneys to defend while constrained by the attorney-client privilege.[191] This lack of concern for the attorney-client privilege in the involuntary assignment context suggests that the privilege may not be a bar to voluntary assignments, and that Alaska law instead prefers the policy of efficient prosecution of legal malpractice actions.

VI. CONCLUSION

Would the Alaska Supreme Court have allowed the assignments of legal malpractice claims at issue in *Juneau Factors*? As discussed above, the *Juneau Factors* case involved two separate assignments:[192] (1) the first assignment occurred when the Spaulding Beach Condominium Association assigned any legal malpractice

187. *See* Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment/Motion to Amend at 6-7, Juneau Factors v. Hughes, Thorsness, Gantz, Powell & Brundin, No. 1JU-92-1799 CI (Alaska Super. Ct., 1st Judicial Dist. filed Sept. 30, 1992).

188. *See* Order Denying Motion for Summary Judgment, *Juneau Factors*, No. 1JU-92-1799 CI (Alaska Super. Ct., 1st Judicial Dist. Nov. 22, 1993).

189. 686 F. Supp. 786 (D. Alaska 1988).

190. *See id.* at 788.

191. *Cf.* Kracht v. Perrin, Gartland & Doyle, 268 Cal. Rptr. 637, 640-41 (Ct. App. 1990).

192. *See* Memorandum in Support of Motion for Summary Judgment Re: Invalidity of Assignment of Legal Malpractice Claim, Ex. D, *Juneau Factors* (No. 1JU-92-1799 CI); *Id.*, Ex. F at 1.

claim it may have had against Hughes Thorsness to the defendant, Joint Ventures;[193] and (2) the second assignment occurred when Joint Ventures, now owners of any malpractice claim against Hughes Thorsness, assigned its potential cause of action to Juneau Factors.[194] Balancing the public policy factors involved in each assignment suggests that the Alaska Supreme Court would not allow either of these assignments.

The first assignment from the Association to its adversary is perhaps one of the most distasteful types of assignment, implicating many of the policy concerns that counsel against assignment. Perhaps the most obvious policy concern implicated is the illogical argument Joint Ventures would have to make to succeed in the malpractice action against Hughes Thorsness. Joint Ventures would have to argue that it should have been required to pay the $415,000 it originally offered to settle the defective construction suit. It would need to explain that it only had the opportunity to lower its settlement offer by $225,000 due to the plaintiff attorney's negligence. Then Joint Ventures would have to convince the jury that having saved $225,000 on the price of settlement, it should recover an additional $225,000 for the "lost settlement opportunity" that was really borne by the Association, not Joint Ventures.

Risk of collusion between the Association and Joint Ventures also is a significant concern. Once the trial court granted Joint Ventures's summary judgment motion and the $415,000 offer to the Association was withdrawn, the Association was placed in the position of trying to maximize the next settlement offer. Since its case had been weakened by the trial court's ruling, the only bargaining chip it may have had left was the malpractice claim against its attorney. Thus, collusion was a significant risk.

Furthermore, a careful application of *Deal v. Kearney*[195] reveals that this first assignment should not be allowed. In *Deal*, the court found that the assignment did not violate public policy against champerty and maintenance because the patient-assignee could not be considered an injured party with respect to the administrator's claims for indemnity, equitable subrogation and contribution and because he was no stranger to the relationship between the hospital and the doctor.[196] He was, in fact, a beneficiary of that relationship as a patient of the hospital. While the assignee of the first assignment, Joint Ventures, cannot be said to be an injured party with respect to the malpractice claim against Hughes Thorsness, it is not only on this rule of non-assignability of per-

193. *See id.*, Ex. D.
194. *See id.*, Ex. F at 1.
195. 851 P.2d 1353 (Alaska 1993).
196. *See id.* at 1355.

sonal injury claims that *Deal* rests. Of great importance is the fact that the patient was involved in and related to the litigation between the hospital and doctor, and thus an assignment to him would not be offensive. An assignment to Joint Ventures would be offensive because it is a stranger to the relationship between the Association and Hughes Thorsness. In fact, it is adversarial to that relationship. It is likely that the Alaska Supreme Court, in carefully applying *Deal*, would have recognized that the assignment to Joint Ventures violates the intent of that case, and should not be allowed.

It is true that the assignment did serve as a useful settlement tool. It may have allowed the Association to maximize its recovery in the defective construction lawsuit and efficiently maximize the value of its cause of action against its attorney. *Bohna* and *Bergen* both suggest that Alaska law values mechanisms that allow persons to realize the value of their malpractice actions. However, in both of those cases, the supreme court supported maximizing the value of legal malpractice actions which were either imminent[197] or already filed.[198] No case against Hughes Thorsness was imminent at the time of the assignment to Joint Ventures. Thus, this assignment may have truly allowed an adversary to supplant the will of the client and create a malpractice action when none would have otherwise been filed. The Alaska Supreme Court may refuse to extend the reasoning of *Bohna* and *Bergen* to allow the effective creation of a legal malpractice cause of action.

The second assignment from Joint Ventures to the newly created Juneau Factors implicates all the policies noted above and seems to involve the very evil that the leading case on the assignment of legal malpractice claims, *Goodley v. Wank and Wank*,[199] feared. Juneau Factors was created to purchase and collect upon causes of action or "factoring" causes of action.[200] *Goodley* counseled against "[t]he lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession [and] generate an increase in legal malpractice litigation."[201] While such a corporation may be effi-

197. *See* Bergen v. F/V St. Patrick, 686 F. Supp. 786, 787 (D. Alaska 1988).

198. *See* Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin, 828 P.2d 745, 748 (Alaska 1992).

199. 133 Cal. Rptr. 83 (Ct. App. 1976).

200. *See* Memorandum in Support of Motion for Summary Judgment Re: Invalidity of Assignment of Legal Malpractice Claim, Ex. G at 5, *Juneau Factors* (No. 1JU-92-1799 CI) (containing settlement agreement in Spaulding Beach Ass'n. v. Jan Van Dort, No. 1JU-87-678 CI (Alaska Super. Ct., 1st Judicial Dist. filed Mar. 16, 1988)).

201. *Goodley*, 133 Cal. Rptr. at 87.

cient at prosecuting malpractice causes of action, it may create more lawsuits than are justified.

While a per se rule against or in favor of the assignment of legal malpractice claims has simplistic appeal, the Alaska Supreme Court should not make, and likely will not be tempted to make, such a pronouncement when it has the opportunity to consider the issue. The policy considerations are mixed and will exist in different proportions depending on the assignment before the court. The most sensible approach, and the one supported by the case law in Alaska, is a careful case-by-case analysis.

Jennifer K. McDannell